BRIEF IN SUPPORT OF PETITION.

OUTLINE OF ARGUMENT.

This argument is confined to the question of the propriety of granting the present writ of *certiorari* and is based upon the numbered points above set forth under the heading Reasons for Granting the Writ.

ARGUMENT.

1. The decision here in question is in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in Rheinstrom v. Commissioner, 105 F. (2d) 642 (C.C.A. 8th, 1939).

The factual situation in Rheinstrom v. Commissioner, 105 F. (2d) 642 (C.C.A. 8th, 1939), is substantially the same as in the present case. There the settlor of the trust gave the trustees discretion to distribute income not only during minority, as in the present case, but also during the entire lives of the beneficiaries. As in the present case, the Commissioner argued that the provision for accumulation caused the gifts to be

of "future interests", but the Court held the gifts to be of present interests and said (p. 647):

> "The Commissioner directs attention to the fact that by the terms of the trust instrument the trustees are not required to pay to these three children their proportion of the income, but may accumulate it for their benefit, or, in the case of two of them, may pay it to them, their wives or children. It is true that the three children, other than Stewart, received no unconditional right to have their shares of the income paid to them by the trustees. It is equally true, however, that the taxpayer retained no interest in the shares of income which were assigned to them, and that, by the terms of the trust, each of them (or the wives and children of the two sons) were to have his or her share or it was to be accumulated for his or her benefit. The enjoyment of the benefits conferred upon three of her children by the taxpayer was conditional, **but it was to commence at once and not at some future date and was for their sole and immediate benefit.**" (Boldface supplied)

In arriving at its decision the Eighth Circuit Court of Appeals cited (p. 648) as supporting authority the decision by the Circuit Court of Appeals for the Third Circuit in **Commissioner v. Krebs**, 90 F. (2d) 880 (C.C.A. 3rd, 1937), which

decision is referred to in the dissenting opinion of the present case as "indistinguishable in principle" from the majority decision (R. 20).

It is clear that both the **Rheinstrom** decision and the decision here in question were concerned with the identical and sharply defined issue of whether a gift in trust, whereunder the trustee has discretion to apply income to the education and support of the beneficiary and is directed to hold the unexpended accumulated income for his benefit, is a gift of a future or of a present interest in property; and it is equally clear that the Circuit Courts of Appeals for the Third and Eighth Circuits rendered directly opposite decisions on such issue and that their decisions are in direct conflict with each other. This conflict can and should be resolved by this Court.

2. The decision here in question is inconsistent with and indistinguishable from the decision by the same Circuit Court of Appeals in Commissioner v. Krebs, 90 F. (2d) 880 (C.C.A. 3d, 1937).

In his dissenting opinion in the present case Judge Maris has stated (R. 19):

> "In my view the case is indistinguishable in principle from our case of Commissioner v. Krebs, 90 F. (2d) 880."

The majority opinion in the present case (R. 15-19) does not attempt to overrule or to distinguish the **Krebs** decision, nor does it even refer to that decision. That the two cases are indistinguishable is apparent from the facts of the **Krebs** case, where the trust income under each of three trusts was to be used by the trustee for the maintenance, support and education of the beneficiary until he attained the age of 25, at which time the accumulated income was to be paid to the beneficiary or his issue, appointees or distributees. The Commissioner had disallowed the gift tax exclusions on the ground that the gifts were of future interests in property, but the Court affirmed the decision of the Board of Tax Appeals that such gifts were of present interests and said (90 F. (2d) 881):

> ". . . tested by the nature of the gifts to the cestuis que trusts, the donor was entitled to the deduction. The donees were named, the respective values of the gifts to them were ascertainable, and they were given the use of the income and of the unexpended accumulated income without an intervening estate, even though physical possession was postponed."

In view of the fact that the **Krebs** decision has not been expressly or impliedly overruled, it would appear that that decision is still accepted

as the law by the Third Circuit Court of Appeals although it is entirely inconsistent with the majority opinion in the present case. The result is a state of confusion within the jurisdiction of the Third Circuit Court of Appeals which can and should be clarified by this Court.

3. The decision here in question is in conflict with the decisions of the United States District Courts within the first, seventh and ninth judicial circuits of the Courts of Appeals.

Within the first judicial circuit, the District Court of Massachusetts, in **Noyes v. Hassett**, 20 F. Supp. 31 (1937), held that transfers in trust whereunder the trustee was given discretion to accumulate any part of the income, instead of distributing it to the designated beneficiaries, were gifts of present interests and were "not future interests within the purview of the statute".

Within the seventh judicial circuit, the District Court for the Northern District of Illinois, in **Wieboldt v. United States**, unofficially reported in 1940 Prentice-Hall Federal Tax Service, Par. 62,729, and 1940 Commerce Clearing House Federal Tax Service, Par. 9539 (1940), held that:

> "Where a gift is made in trust and said trust is irrevocable with respect to the donor

> and said trust provides that the net income arising from the portion of the trust estate set apart for the benefit of each donee of the Settlor shall be accumulated and added to the principal of said portion of the trust estate so set apart until the happening of some contingency, such provision does not render said gift a gift of a future interest within the meaning of Section 504(b) of the Revenue Act of 1932."

Within the ninth judicial circuit, the District Court for the Northern District of California, in **Kinney v. Anglim,** 1941 Commerce Clearing House Inheritance, Estate and Gift Tax Service, Par. 10,100 (1941), held that there were gifts of present interests, entitling the donor to three gift tax exclusions of $5,000 each, where the income of a trust was to be paid to the mother of each beneficiary until such beneficiary reached 21 years of age.

In the absence of any decisions on similar facts by the Courts of Appeals in the foregoing judicial circuits, it would appear that these decisions of the United States District Courts represent the only applicable law within such judicial circuits. Ambiguous language in the decision by the Circuit Court of Appeals for the First Circuit in **Welch v. Paine,** 120 F. (2d) 141 (1941), cited for comparison in the majority decision in the pres-

ent case (R. 15), and indicated by the dissenting opinion to be "distinguishable on its facts" (R. 20), tends to confuse rather than to clarify the law within the first judicial circuit as to the meaning of present and future interests.

Therefore, the manifest inconsistency between the decision here in question and the aforementioned decisions of the District Courts within the first, seventh and ninth judicial circuits presents a state of confusion in the law which can and should be clarified by this Court.

4. The decision here in question is probably in conflict with the decisions of this Court in United States v. Pelzer, 312 U.S. 399 (1941), and Ryerson v. United States, 312 U.S. 405 (1941).

The majority opinion of the court below recognizes that in the present case the life estate "vests immediately and the accumulation is thereafter", whereas in the case of **United States v. Pelzer**, 312 U.S. 399 (1941), "some accumulation (10 years' worth) occurs before the vesting", but that opinion states that such difference does not constitute a distinction sufficient to require different results in the two cases (R. 16-17). This reasoning probably conflicts with that of this Court in **United States v. Pelzer**, where the immediate vesting of the beneficial interests in ascertained bene-

ficiaries was expressly decreed to be the vital factor. In that decision it was said that (312 U.S. 404):

> "Here the beneficiaries had no right to the present enjoyment of the corpus or of the income and unless they survive the ten-year period they will never receive any part of either. The 'use, possession, or enjoyment' of each donee is thus postponed to the happening of a future uncertain event. The gift thus involved the difficulties of determining the 'number of eventual donees and the value of their respective gifts' which it was the purpose of the statute to avoid."

In the present case the "use, possession and enjoyment" is not postponed to the happening of a future uncertain event, and there is no possible difficulty in determining the "number of eventual donees and the value of their respective gifts."

The decision in **Ryerson v. United States**, 312 U.S. 405, 409 (1941), likewise held the gifts there in question to be of future interests because "all those who might become entitled to the use and enjoyment of the trust, principal and income, were ascertainable only upon the happening of one or more uncertain future events . . . " The unmistakable reasons for the decisions in the **Ryerson** and **Pelzer** cases, although completely disregarded in the majority opinion of the deci-

sion here in question, are properly recognized in the dissenting opinion in the comment that (R. 19):

> "In neither case was there a definitely ascertained beneficiary of the income at the time of the gift or any provision for present distribution or use of that income."

It is submitted that the decisions of this Court in **United States v. Pelzer**, and **Ryerson v. United States, supra**, have been subjected to an erroneous interpretation never intended nor contemplated. The effect of such an interpretation will not be restricted to the third judicial circuit, but has and will create confusion and inconsistency throughout the entire country. The decisions of the Board of Tax Appeals in the present case (R. 12) and in **Charles W. Deeds**, 37 B.T.A. 293 (1938), and **Seymour H. Knox**, 36 B.T.A. 630 (1937), all recognize that gifts may be of present interests even though there may exist discretionary power in the trustee to accumulate so much of the income as is not necessary for the maintenance, education or support of the beneficiaries; and the Commissioner of Internal Revenue has not withdrawn his acquiescence in the two latter decisions, which are respectively reported at 1938—1 Cum. Bull. pages 8 and 17.

Accordingly, it is submitted that this Court can and should dispose of the doubts and confusion

created by the erroneous interpretation given by the present decision to the decisions of this Court in the **Pelzer** and **Ryerson** cases, and that this Court can and should resolve the probable conflict that has resulted.

5. The decision here in question involves an important question of federal law which is presently in a state of confusion and which has not been, but should be, settled by this Court.

It is evident from the foregoing discussion that the present decision is in conflict with other decisions of the Circuit Courts of Appeals, the United States District Courts and the United States Board of Tax Appeals. Moreover, the Commissioner's present view as represented in the present decision is in direct conflict with his acquiescence in the contrary decisions of the Board of Tax Appeals in **Charles W. Deeds** and **Seymour H. Knox, supra.**

This state of confusion can be traced back to the time at which the Commissioner attempted to reduce the number of gift tax exclusions under Section 504(b) of the Revenue Act of 1932 by contending that, in the case of a gift in trust, there was only a single gift to the trustee rather than multiple gifts to the more numerous beneficiaries of the trust. At this time disallowance of exclu-

sions because the gifts were of future interests was not asserted in all of the cases in litigation because, apparently, the Commissioner was satisfied to rely on the equally efficacious issue based on a single gift to the trustee.

After protracted litigation in the lower courts, this Court held that the donees of the gifts were the beneficiaries and that gift tax exclusions were allowable as to each beneficiary. **Helvering v. Hutchings**, 312 U.S. 393 (1941); **United States v. Pelzer** and **Ryerson v. United States, supra.** However, the further ground for decision in the **Pelzer** and **Ryerson** cases, to the effect that the gift tax exclusions were not allowable since in those cases the gifts were of future interests, has resulted in further efforts by the Commissioner to disallow as exclusions any gifts in trust under which the income is not expressly required to be paid and distributed immediately upon its receipt.

The changed attitude of the Commissioner is best illustrated by this Court's decision in **Helvering v. Hutchings, supra.** The facts stated in the opinion of the Board of Tax Appeals, 40 B.T.A. 27 (1939), indicate that the trustee had discretion to distribute or accumulate the income for the benefit of each of seven children of the grantor. The Commissioner did not raise the issue of "future interest" before either the Board of Tax Appeals or the Circuit Court of Appeals (111 F.

(2d) 229 (C.C.A. 5th, 1940)), but that issue was raised before this Court for the first time and, since the question had not been presented in the petition for *certiorari,* it was not considered. This Court said (312 U.S. 398):

> "Nor do we consider whether the gifts to the beneficiaries here are of future interests which are excepted from the benefit of the $5,000 deduction allowed by §504(b). That question is not presented by the petition for certiorari. But our judgment will be without prejudice to consideration of that question by the Board of Tax Appeals upon the remand to it if, under the rules of procedure governing proceedings before the Board, the Commissioner is free to present the question there."

It is believed that the issue which was not properly before this Court in the **Hutchings** case is, for the first time, clearly and properly presented in the present case. Accordingly, it is submitted that the confusion presently existing on this important federal question among the lower courts, and also among the administrative agencies concerned with the enforcement of the internal revenue laws, can and should be clarified and settled by this Court.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of *certiorari* should be granted.

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